(3)

No. 10-751

IN THE

Supreme Court of the United States

OMAR KHADR, *et al*
(AND CONSOLIDATED CASES),
Petitioners,

v.

BARACK OBAMA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO BRIEF IN OPPOSITION

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1. This is one of three interlinked cases in which Guantánamo detainees seek to overturn the D.C. Circuit's decision in *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) ("*Kiyemba II*").

(a) *Mohammed v. Obama*, No. 10-746. The petitioner, an Algerian, sought reinstatement of a preliminary injunction barring the Government from transferring him to Algeria. The D.C. Circuit overturned the injunction based on *Kiyemba II*. On January 5, 2011, the Government transferred Mr. Mohammed to Algeria, rendering his case moot. In his reply brief, Mr. Mohammed acknowledged that his case was moot and stated that he will move to dismiss it under Rule 46. He suggested, however, that the Court consult his petition in considering Mr. Khadr's petition, because Mr. Khadr's petition and Mr. Mohammed's petition present a common question, and to avoid duplication, Mr. Khadr incorporated in his petition Mr. Mohammed's discussion of the common question. (*See* Khadr Pet. at 6.)

(b) *Khadr v. Obama*, No. 10-751. In this case – the instant case – Petitioners seek reinstatement of orders issued in 2008 ("2008 notice orders") requiring the Government to give a detainee's counsel 30-days' notice of any intended transfer of the detainee from Guantánamo. The D.C. Circuit overturned the 2008 notice orders based on *Kiyemba II*.

(c) *Abdah v. Obama*, D.C. Cir. No 05-5224. In *Abdah*, the Government seeks invalidation of orders issued in 2005 ("2005 notice orders") requiring it to give a detainee's counsel 30-days' notice of any intended transfer of the detainee from Guantánamo. The Government argues that the 2005 notice orders are precluded by *Kiyemba II*. The D.C. Circuit denied

the petitioners' request for initial hearing en banc. *Abdah v. Obama*, 630 F.3d 1047 (D.C. Cir. 2011). Circuit Judge Thomas B. Griffith, joined by Judge Judith W. Rogers and Judge David S. Tatel, dissented. *Id.* at 1048-54. The D.C. Circuit has not yet acted on the Government's appeal.

2 In his dissent from the D.C. Circuit's denial of initial hearing en banc in *Abdah*, Judge Griffith called *Kiyemba II* "fundamentally flawed." *Abdah*, 630 F.3d at 1048. Judge Griffith first reviewed the historical record. *Id.* at 1048-51. He concluded: "Since at least the seventeenth century, the writ of habeas corpus has guaranteed prisoners the very right the *Kiyemba II* court failed to protect: the right to challenge transfers beyond the reach of the writ." *Id.* at 1048. Judge Griffith then reviewed the *Kiyemba II* court's reading and application of *Munaf v. Geren*, 553 U.S. 674 (2008). *Abdah*, 630 F.3d at 1052-54. Judge Griffith pointed out that "[w]hether the *Munaf* prisoners were entitled to notice was never at issue, because the prisoners already had notice of their proposed transfers and a meaningful opportunity to challenge them in an Article III court. By denying these fundamental procedural rights, *Kiyemba II* went well beyond the holding of *Munaf*." *Id.* at 1052. Judge Griffith stated:

> In relying on *Munaf*'s treatment of the merits of a transfer claim, the *Kiyemba II* court was fundamentally confused. Notice is a necessary element of the right to challenge a transfer, and this right does not depend on whether the challenge is likely to succeed. By holding otherwise, the *Kiyemba II* court put the detainee in an impossible position: To receive

> notice of a transfer, he must first show that it is likely unlawful. But he cannot make that showing without knowing any details of his transfer except that he might be sent some day to some place for some reason. This Catch-22 eliminates any "meaningful opportunity" to challenge a transfer.

Id. at 1053-54 (citing *Boumediene v. Bush*, 553 U.S. 723, 779 (2008)).

In its discussion of *Munaf*, the Government, like the *Kiyemba II* court, "fundamentally confused" the right of a detainee to challenge a transfer (and thus the right to be given notice of the transfer) and the likelihood that the detainee's challenge will succeed. (*See* Br. Opp'n at 5-6, 8.) The Government's only answer is that "petitioners [cannot] claim a right to advance notice of transfer where the notice could not provide any relief" (*Id.* at 10; *see also id.* at 7.) But as Judge Griffith noted, the D.C. Circuit itself "allowed for the possibility that some transfers could be unlawful." *Abdah*, 630 F.3d at 1054. *Munaf* also allowed for that possibility, in "a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway." 553 U.S. at 702; *see id.* at 706 (Souter, J., joined by Ginsburg and Breyer, JJ., concurring).

The Government argues that Petitioners' claim that they have a due process right to challenge a transfer to another country "is foreclosed by *Munaf*, which rejected a due process challenge by United States citizen detainees to their transfer." (Br. Opp'n at 10) The context and nature of the *Munaf* petitioners' claims were entirely different from those of Peti-

tioners here. *See Munaf*, 553 U.S. at 695. This Court stressed, moreover, that the cases "concern[ed] only the statutory reach of the writ" and did not address "the constitutional scope of the writ." *Munaf*, 553 U.S. at 685 n.2. *Boumediene* held that Guantánamo detainees have a constitutional right to seek the writ. *See* 553 U.S. at 771. Finally, *Khouzam v. Attorney General*, 549 F.3d 235 (3d Cir. 2008), on which the Government relies (Br. Opp'n at 12), held that the petitioner, an Egyptian facing return to Egypt, "was denied Due Process" because the Government failed to provide him with notice and an opportunity to test the reliability of Egypt's diplomatic assurances that he would not be tortured if returned. 549 F.3d at 260.

3. Finally, the Government is silent as to Mr. Khadr's claim that section 242(a)(4) of the Immigration and Naturalization Act, 8 U.S.C. § 1252(a)(4), would violate the Equal Protection Clause if construed to allow only individuals seeking judicial review of removal orders to assert CAT claims, while precluding other individuals, who may also be facing transfers to likely torture, from asserting such claims. (*See* Pet. 9.)[1]

The Court should grant the petition.

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[1] As noted, this Court declined to reach the § 242(a)(4) issue in *Munaf* (Pet. 5.) *See Munaf*, 553 U.S. at 703 n.6.

Respectfully submitted,

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